IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S OBJECTION TO ORDER GRANTING MOTION TO COMPEL DISCOVERY OF PETERSON FARMS [DKT#1463] AND ORDER DENYING RECONSIDERATION THEREOF [DKT# 1629]

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COMES NOW, the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State") and, pursuant to Fed. R. Civ. P. 72(a) respectfully objects to the Magistrate Judge's Order [DKT # 1463] granting the motion to compel of Peterson Farms and to the Order [DKT # 1629] denying reconsideration.

I. Introduction.

Defendant Peterson Farms, Inc. (Peterson) filed a motion to compel discovery [DKT # 1276] challenging certain assertions of attorney-client privilege and work-product protection by the State arising from document discovery in this matter. On January 16, 2008, Magistrate Judge Joyner entered an order holding, contrary to the weight of authority, (1) that the state law of attorney-client privilege applies in a case such as this one involving federal-question jurisdiction, (2) requiring the State to revise its privilege logs in such a fashion that would, as a practical matter, require the revelation of information itself privileged or protected, and otherwise abrogating the State's privilege claims, (3) impliedly holding that the attorney client privilege

under state law ended when a proceeding was no longer pending, and (4) holding that Peterson had established a "special need" for documents for which the State has claimed work product protection, while not only making no provision for an individualized document-by-document showing of "substantial need" for the State's fact work product, but also making no provision for protection against disclosure of the State's opinion work product. Because this order is clearly erroneous and contrary to law, the State objects and appeals to the District Court.

II. Procedural background

After response to Peterson's motion to compel and oral argument, the Magistrate Judge granted the motion to compel in his Order [DKT #1463]. On January 28, 2008 the State moved for reconsideration [DKT #1486] and to stay applicability of the ruling until its motion for reconsideration was ruled upon [DKT #1487] and for expedited hearing on its motion for stay. By minute order dated January 29, 2008 [DKT #1496] the Court denied the request for expedited hearing, denied the request to stay applicability of the order, and extended the document production date until March 7, 2008 to allow full briefing on the issues raised by the motion for reconsideration. On January 28, 2008 the State moved for additional time to comply with the order in light of the proceedings on the State's motion for preliminary injunction [DKT # 1617]. Thereafter, on March 14, 2008, the Court affirmed its Order on reconsideration [DKT # 1629] and extended the document production date required by the Order to April 4, 2008.

III. Legal Standard

Federal Rule of Civil Procedure 72(a), which governs nondispositive orders by Federal Magistrate Judges, states that "[a] party may serve and file objection to the order within 10 days after being served with a copy." Rule 72(a) also states that, "the district judge to whom the case is assigned shall consider timely objections and modify or set aside any part of the order that is

clearly erroneous or is contrary to law." A finding of fact is clearly erroneous if it is without factual support in the record. *Wyerhaeuser Co. v. Brantly*, 2007 WL 4443244 (10th Cir. Dec. 20, 2007).

IV. Argument

In its order of January 16, 2008 (DKT #1463) ("the Order") the Court erred (1) in holding that the state law of attorney-client privilege applies to this federal-question case, (2) in requiring the State to revise its privilege logs in such a fashion that they would disclose to Defendants "how disclosure [of documents for which attorney client privilege is claimed] will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest," (3) in its implied holding that a claim of privilege under Oklahoma law terminated with the pending investigation, claim or action and (4) in holding that Peterson has established a "special need" for documents for which the State has claimed work-product protection, while making neither provision for an individualized document by document showing of "substantial need" nor provision to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of attorneys or other representatives of the State. Moreover, the Court's stated premise in ordering the production of documents for which work-product protection was claimed -- that there was a representation that the "requested documents contain data from prior time periods" the substantial equivalent of which cannot be obtained from any other source -- is without foundation in the record and thus is clearly erroneous.

A. Federal law, not state law, should apply.

The Magistrate held that the state law of privilege applies, even though this case involves substantial questions of federal law. The Magistrate essentially agreed with Peterson, which

claimed in its motion to compel, that the State should be limited in its attorney-client privilege to those matters covered by the state law of attorney-client privilege for public officers or agencies, which provides no privilege:

> As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

12 Okla. Stat. § 2502(D)(7). The State responded that, in this federal question case, the federal common law of privilege should apply. This became an issue because the scope of Defendants' discovery encompassed documents generated by many administrative and court investigations, claims and proceedings other than the present case, some of which the State claimed were covered by privilege. The State sought to protect its privileged documents generated in those cases, but the import of the Court's ruling applying the state privilege law will subject documents generated in the course of the State's attorney client relationship in the *present case* to challenge and Court review to determine whether or not disclosure of those documents "will seriously impair the ability" of the State to conduct the present case in the public interest.

1. The Tenth Circuit requires an analytical solution in cases in which conflicting federal and state privilege laws both potentially apply.

This case was filed under two federal statutes (CERCLA and RCRA) and the federal common law of nuisance, as well as pendant state law claims. The federal law of attorney-client privilege applies in this federal-question case with pendant state law claims. Even the cases cited by Peterson, *see* Peterson Motion, [DKT # 1276] pp. 8-9, establish that "in cases where pendent state claims are raised, the federal common law of privileges should govern all claims of privilege raised in the litigation." *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458-59 (N.D. Cal. 1978) (emphasis added).

Analysis of the federal law of attorney-client privilege begins with Federal Rule of Evidence 501 which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Thus, in cases in which only federal questions exist, privileges are determined by the federal common law. In diversity cases in which only state claims exist, privileges are determined in accordance with State law of privileges.

The Tenth Circuit has noted in *dicta* that where both federal and state claims are implicated, the lower courts could apply an "analytical solution" to solve any conflict:

> With both federal claims and pendent state law claims implicated, we should consider both bodies of law under *Motley* and Fed. R. Evid. 501**.** If the privilege is upheld by one body of law, but denied by the other, problems have been noted. "In this situation, permitting evidence inadmissible for one purpose to be admitted for another purpose defeats the purpose of a privilege. The moment privileged information is divulged the point of having the privilege is lost." 3 *Weinstein's Federal Evidence*, § 501.02[3][b] (Matthew Bender 2d ed.) (citing *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D.Cal. 1978)). If such a conflict on the privilege exists, then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law.

Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1368-69 (10th Cir. 1997). The Tenth Circuit, however, never developed an "analytical solution" in that case because the attorney-client privilege applied regardless of what law applied. *Id*, at 1369. However, immediately following the language in *Sprague v. Thorn Americas, Inc.*, cited above, appears footnote 7 in which the Tenth Circuit summarizes law from other circuits in similar situations, and in which every case

cited applied federal, rather than state privilege law. The State respectfully suggests that this Court's departure from the overwhelming weight of authority would constitute a departure from the "light of reason and experience" which is the foundation of Federal Rule of Evidence 501 and therefore is clearly erroneous and contrary to law.

Where courts have actually addressed the problem of which law to apply in cases involving both state and federal claims, courts have uniformly applied the federal common law of privilege. For instance, the Third Circuit wrote that the federal law of privilege must apply in this situation:

> Thus, federal courts are to apply federal law of privilege to all elements of claims except those "as to which State law supplies the rule of decision." In general, federal privileges apply to federal law claims, and state privileges apply to claims arising under state law. The present case, however, presents the complexity of having both federal and state law claims in the same action. The problems associated with the application of two separate privilege rules in the same case are readily apparent, especially where, as here, the evidence in dispute is apparently relevant to both the state and the federal claims. This court has resolved this potential conflict in favor of federal privilege law. Noting that "applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable," we held that "when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982). Accordingly, for the resolution of the present discovery dispute, which concerns material relevant to both federal and state claims, Rule 501 directs us to apply federal privilege law.

Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000) (emphasis added) (footnotes omitted).

Even Peterson's chief case, *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978), contrary to Peterson's suggestion, applies the federal law of privilege in similar circumstances:

> In the absence of any indication as to legislative intent in the language or legislative history of Rule 501, the Court believes that in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation. This was the approach suggested by the Senate Judiciary Committee (see S. Rep. No.1277, 93d

> Cong., 2d Sess. 12 n. 16, reprinted in (1974) U.S. Code Cong. & Admin. News, p. 7059 n. 16), and it seems to be the approach most consistent with the policy of Rule 501. That policy, simply stated, is that "(i)n nondiversity jurisdiction civil cases, federal privilege law will generally apply." H.R. Rep. No.1597, 93d Cong., 2d Sess. 7, reprinted in (1974) U.S. Code Cong. & Admin. News, p. 7101. It should not be cast aside simply because pendent state claims are raised in what is primarily a federal question case.

Perrignon, 77 F.R.D. at 458-59 (emphasis added). Another case, *Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 633 (M.D. Pa. 1997), cited by Peterson in its Motion [DKT # 1276], p. 10, also holds that in a federal question case with supplemental state law claims, the federal law of privileges governs the entire case, relying upon *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).[1]

2. The Court's analytical solution is clearly erroneous and contrary to law because it departs from an analysis of privilege law, and ignores the uniform application of federal privilege law in cases like this one.

In the face of the uniform application of the federal common law of privilege in federal question cases having pendant state claims, the Court fashioned an analytical solution in which it substituted the supposed substantive law interests of state and federal claims for the state and

[1] Other courts have arrived at the same conclusion in a variety of contexts. *Atterberry v. Longmont United Hospital,* 221 F.R.D. 644, 646-47 (D.Colo. 2004) (The federal law of privilege governs even where the evidence sought also may be relevant to pendent state law claims.); *Hinsdale v. City of Liberal, Kansas,* 961 F.Supp. 1490, 1493 (D.Kan. 1997)(All of the circuits that have directly addressed this issue have held that the federal law of privilege governs on issues of discoverability and/or admissibility even where the evidence sought might be relevant to a pendant state claim, citing cases); *In re Combustion,* 151 F.R.D. 51, 54 (WD La 1995), aff'd 161 F.R.D. 54, 55 (CERCLA case with pendent state claims: the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discoverability of evidence in this federal question case involving pendent state claims); *Hancock v. Hobbs,* 967 F.2d 462, 465 (11th Cir. 1992)(The federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question, even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law of privilege.); *Hancock v. Dodson,* 958 F.2d 1376, 1373 (6th Cir. 1992)(The existence of pendent state law claims does not relieve court of its obligation to apply the federal law of privilege).

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federal privilege law interests and found, without explanation or further analysis, that "state law claims are of equal importance to the federal claims raised." Order [DKT # 1463] at page 2. This analysis misses the mark for at least two reasons. First, the Tenth Circuit requires an analytical solution which accommodates the conflicting policies embodied in the state and federal privilege law, not the substantive law of the claims raised. *Sprague*, 129 F.3d at 1368-69. Instead of focusing on the respective policies of state and federal privilege law, the Court concluded, without explanation, that state law substantive claims in the lawsuit were of equal importance to the State's substantive federal law claims.[2] The analysis completely failed to consider and weigh the privilege law policies as required by the Tenth Circuit, and, indeed gave no consideration at all to the policies underlying federal privilege law. This was clearly erroneous and contrary to law.

Second, the Court clearly was swayed by the provisions of the Oklahoma Open Records Act which it found reflected a "public policy" presuming that the records of the State should be open. Order [DKT # 1463] at page 3. But the "policy" of the Open Records Act is irrelevant to the privilege law questions presented. Even if it were relevant, the Open Records Act specifically recognizes certain exemptions from disclosure where valid privileges or confidentiality exists. For example, the Open Records Act does not apply to documents required by law to be kept confidential, such as "records protected by a state evidentiary privilege such as

[2] Even if some consideration of the substantive law claims in the case were relevant, the interests for which protection is sought by state or federal claims are not distinctly different, being an injunction or abatement of further pollution, and remediation and restoration of injured resources, compensation to the State for harm caused to its resources, as well as for the unjust enrichment of Defendants resulting from their improper waste disposal practices. Nothing about those claims, or about the fact the State is seeking to stop the pollution, have the pollution cleaned up, and be compensated for harm caused by the pollution, distinguishes this case from every other case cited in which the federal common law of privilege has been applied to federal question cases in which pendant state law claims are filed.

the attorney-client privilege, the work product immunity from discovery and the identity of informer privileges." 51 Okla.Stat § 24A.5(1)(a). The Open Records Act also keeps confidential the litigation files and investigatory reports of the Attorney General and agency attorneys. See 51 Okla.Stat. § 24A.12. Further, "[r]ecords coming into the possession of a public body from the federal government or records generated or gathered as a result of federal legislation may be kept confidential to the extent required by federal law." 51 Okla.Stat. § 24A.13. Thus, the Order was clearly erroneous and contrary to law in this respect as well.

The Court next concluded that the "state interest" is strong as evidenced by the filing of this action by the Oklahoma Attorney General. Order [DKT # 1463] at page 2. The unarticulated premise behind this conclusion seems to be that if the Attorney General brings claims authorized by Congress and the federal common law, as well as state pendant claims, because he is the chief law officer of the State, state law privilege interests necessarily predominate. This point overlooks the federal interest articulated by Congress in allowing states to come into federal courts under CERCLA and RCRA, whether through their attorneys general or otherwise, to vindicate national environmental policy and interests, and overlooks as well the federal common law of nuisance. In effect, the Court simply took no account of the interest in application of the federal law of privilege in federal question cases having pendant state claims. Again, this was clearly erroneous and contrary to law.

Federal courts long have viewed the attorney client privilege's central concern as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992), relying upon *Upjohn v. United States*, 449 U.S. 383, 389 (1981). Thus, the confidentiality of communications between an attorney and the

client is protected precisely because it promotes "broader public interests in the observance of law and administration of justice." Knowledge that communications between counsel and representatives of the client (the State) may be so easily invaded will inevitably chill those communications and will, equally inevitably, seriously impair the very public interest in the observance of law and administration of justice which is the purpose of the attorney client privilege. As such, in this respect as well, the Order is clearly erroneous and contrary to law.

3. The Order is clearly erroneous and contrary to law in stripping the attorney client privilege from documents pertaining to terminated claims because once the privilege attaches to a document, the privilege remains permanently.

The Court required production of documents "which were created prior to a pending claim or which are subject to a claim that is no longer pending . . . ." Order [DKT 1463] at page 4.[3] Even assuming that the Court were correct that state privilege law applies in this federal question case, the Order is clearly erroneous and contrary to law in its conclusion that the attorney-client privilege somehow expires once a pending claim is completed. No Oklahoma case so holds. Long-standing law holds that materials subject to the attorney client privilege are permanently protected from disclosure, except when the privilege is waived, *see, e.g., Lewis v. Unum Corporation Severance Plan,* 203 F.R.D. 615, 618 (D. Kan. 2001), and that the privilege continues even after the relationship has been terminated. *See, e.g., Chandler v. Denton*, 741 P.2d 855, 865 (Okla. 1987). Thus, no support exists for the Court's unprecedented holding that

[3] The Order strips the privilege from documents pertinent to "claims," while the Oklahoma statute mentions pending investigations, claims, or actions. 12 Okla.Stat. § 2502(7). The State assumes the Court did not strip the privilege from documents pertinent to once-pending but now completed investigations or actions, and that such documents, consistent with the general law of attorney client privilege, remain privileged. This presents the State with a significant ambiguity in determining which documents pertain to "claims," and which pertain particularly to "actions."

based upon state privilege law, the privilege exists only while a claim is pending, and that the privilege is removed once the claim has been terminated.

The Tenth Circuit has noted that release of information or documents even indirectly implicating the attorney-client privilege:

> would make a defendant "reluctant to reveal information that could help the attorney in the defense of the case, or in analyzing the strength of the case for trial." *Gonzales*, 1997 WL 155403, at *8; *see Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir.1980). The importance of this privilege and doctrine is well-established, *see Upjohn Co. v. United States*, 449 U.S. 383, 389-92, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), a point which the Supreme Court just recently reemphasized in holding that the attorney-client privilege extends beyond the death of the client. *See Swindler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 2084-88, 141 L.Ed.2d 379 (1998). Certainly, then, the privilege does not terminate when the Defendants' trials are over.

U.S. v. Gonzales, 150 F.3d 1246, 1266 (10th Cir. 1998) (emphasis added) (footnote omitted). Thus, the attorney-client privilege extends beyond the end of the attorney-client relationship, beyond the life of the client (with exceptions not pertinent here) and beyond the life of the litigation or case giving rise to it. Once the privilege attaches to a communication, that communication remains privileged, unless there is a waiver by the client. Loss of privileges, valid even under state law, once the claim is over is a manifest injustice which the State should not have to suffer. For the Court to have concluded otherwise in the Order was clearly erroneous and contrary to law.

4. In the event the Court upholds the determination that state privilege law applies, the revised privilege logs should be submitted *in camera.*

Without receding from its view that the Court erred as a matter of law in holding that state privilege law applies to this federal question case, the State respectfully submits that the requirement of the Court's Order, which calls for the State to "state how disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending

investigation, litigation or proceeding in the public interest" on a privilege log to be given to Peterson Farms, is clearly erroneous. Instead, the revised privilege log should be submitted to the Court *in camera.*

A privilege log which tends to disclose the information to be protected by privilege should not be required. *See* Fed. R. Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: . . . (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. (Emphasis added.) The Court's Order places an impossible burden upon the State. On the one hand, if the description of the document is sufficient to explain the harm done by its disclosure, it will necessarily reveal something of the information sought to be protected. On the other hand, if the State uses some generic description of the harm to the public interest by disclosure, it will likely be asserted that the description is not sufficiently informative to allow assessment of the privilege claim. In the event the Court upholds its (erroneous) determination that state privilege law applies, at a minimum the State should be allowed to submit its revised logs *in camera* where the Court can make a determination of potential harm to the public interest. This would comport with the requirements of 12 Okla. Stat. § 2502(D)(7), which imposes upon the court the duty to determine if "disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest." The Oklahoma statute has no provision for making that determination in an open, adversary proceeding. *In camera* production of the revised privilege log satisfies the requirements of both the Oklahoma statute and Fed. R. Civ. P. 26(b)(5)(A).

Because no Oklahoma case exists giving guidance about how to evaluate claims of privilege under these circumstances, the Court should err on the side of caution in the preservation of the State's privileges and conduct an *in camera* review.

B. The Order ignores the State's work-product privilege.

The Court's original treatment of the State's claim of work product stated, in its entirety:

> As to documents which have not been produced under a claim of work product, the Court finds Peterson has established a special need for those documents and that the documents are not available from any other source pursuant to Fed. R. Civ. P. 26(b)(3) and Fed. R. Civ. P. 26(b)(4). Such documents are to be produced within thirty (30) days of the date of this Order.

Order {DKT # 1463] at page 4. In its order denying reconsideration, the Court dealt with the State's work product claims by stating:

> State urges the court has not protected the mental impressions of counsel under its current order. As to those documents which have not been produced *solely* under a claim of work product, the court found that Peterson has established a special need and the documents are not available from any other source under Fed. R. Civ. P. 26(b)(3). (emphasis added). The court's order was premised upon the representation that requested documents contain data from prior time periods. The substantial equivalent of data from prior time periods cannot be obtained from any other source. The court denies the request for reconsideration as to this issue reiterating the language of the original order, "At this time, production of data is not required beyond the five (5) year temporal limit previously imposed by this Court."

Order [DKT # 1629] at page 3. Before demonstrating the other errors in these two rulings, the State notes that it is plain on the face of these two orders that the Court still has not made the required provision for protecting the mental impressions and theories of counsel (i.e., the State's opinion work product), even while noting that the State has pointed that deficiency out to the Court.

By its terms, this Order strips the work product protection, not from some discrete set of documents, but from all documents on the log for which the State has asserted a claim of work

product protection. Thus, it sweeps away both opinion and fact work product alike upon an erroneous finding that Peterson Farms has demonstrated "a special need." Even assuming the Order is intended to apply only to those invocations of work product protection specifically challenged by Peterson, no individualized showing of entitlement to remove fact work product protection has been made for each item on Peterson's list of challenged documents. *See* Exhibit 11 to its motion [DKT # 1276]. Peterson must demonstrate a substantial need for the specific documents or information in issue or that they are unable to obtain the substantial equivalent of the materials by other means without undue hardship in order to justify access to the State's work product. *Maertin v. Armstrong World Industries, Inc.*, 172 F.R.D. 143, 150 (D.N.J. 1997). Peterson must demonstrate substantial need for the specific documents or information at issue, *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 689-90 (E.D. Pa. 1986), and have failed to do so.

The State respectfully submits that this holding is both factually unfounded with respect to the alleged demonstration of "special need," and, in any event, employs the incorrect legal standard with respect to the State's opinion work product. Peterson has wholly failed to make the required showings of substantial need and absence of any substantial equivalent source of the desired information as is required by Fed. R. Civ. P. 26(b)(3).

1. Peterson has not established a "special need" for all of the State's fact work product, or even for that part challenged by Peterson.

Rule 26(b)(3) provides that work product material is subject to discovery:

> . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Peterson did not seriously attempt to make such a showing, nor could it. Peterson presented no

affidavit establishing the elements required to gain access to the State's fact work product, even for those items on its Exhibit 11. Peterson simply has not articulated any "substantial need" on a document by document basis to invade that protected fact work product. A conclusory and *pro forma* objection to a work product claim is not sufficient to establish a "substantial need" or "undue hardship." *Chaikin v. VV Publishing Corp.* 1994 WL 652492, * 2 (S.D.N.Y. 1994).

The Court's ordered the production of the State's work product based on the false premise that there was a representation that requested documents contain data from prior time periods and the substantial equivalent of data from prior time periods cannot be obtained from any other source. Order [DKT # 1629] at page 3. The Court did not support this premise by any specific reference to the record, and, indeed, it is unfounded in the record. At the hearing on this matter counsel for Peterson conceded that they had gotten documents about the Jock Worley gravel mine, which was claimed to be a source of pollution in the IRW, Hearing of December 6, 2007, Tr. 60:9-11 (Exhibit 1 hereto), and that they had received over a million pages of documents from the State, Tr. 69:5-10. In fact, the State has given Defendants the entire Jock Worley permit file (from the Oklahoma Department of Environmental Quality and the Oklahoma Department of Mines, which contain all factual information regarding the Jock Worley site, except for protected attorney client communications and work product). Tr. 97:19-24. Additionally, the State produced 35 boxes of material about the Sequoyah Fuels Corporation (SFC) that Peterson also claimed was a pollution source. Tr. 106:22-24.

At the hearing, the State maintained that it had given Defendants such a volume of other material, they did not have any extraordinary need for the State's work product. Tr. 107:21-Tr. 108:3. Counsel could point to no specific data in the State's work product, but there might have been some, Tr. 108:10-11. However, there is a great deal of potentially comparable publicly

available data on the IRW and Lake Tenkiller, and it is hard to discuss what data is available in the abstract. Tr. 108:25-109:9. The State's discussion of work product was necessarily abstract and general because Peterson only made specific challenges to a limited number of work product documents, which were adequately dealt with in the State's brief, but made only a generalized challenge to all the other documents on its Exhibit 11. Similarly, the Court made no document by document examination of the State's work product before finding Peterson had a special need for it. The State's point at argument, as herein, is that, even if there were some data in some work product which Peterson did not bother to specifically challenge, there was ample evidence and data available to constitute its substantial equivalent. Because there is no basis in the record for the Court's findings, they are clearly erroneous and contrary to law.

Further, if "substantial need" were demonstrated so easily, the State certainly has an equivalent substantial need for the fact work product of Peterson and the other Defendants. After all, the fact work product of defense counsel, appearing in the files of Peterson, undoubtedly discloses the corporate knowledge of Peterson about environmental hazards from its operations, relevant data about its operations, and potential liability for its activities. This data and information is no more readily available elsewhere than are the contents of the State's fact work product, so, by operation of the "Goose and Gander" principle under the standard being applied by the Court, the State has no substantial equivalent without undue hardship. The State does not believe fact work product may be so casually invaded, but insists that if its fact work product were to be available on such a conclusory showing, so must be the fact work product of all of Defendants. Therefore, the State respectfully asks the Court to review the Orders set forth above regarding Peterson's' claims and to determine whether or not a conclusory showing of "substantial need" and no "substantial equivalent" without "undue hardship" shall be the

universal rule to be applied in this case. The State submits that such a conclusory assertion as that made by Peterson is, as a matter of law, an insufficient showing to invade the protections afforded fact work product.

For example, Peterson claims a "substantial need" for information about Sequoyah Fuels Corporation (SFC), and its polluted site at the lowest end of the IRW, without even articulating what the "substantial need" for those documents is. Peterson has wholly failed to articulate either the relevance of these documents, or its "substantial need" for them, especially in light of the dozens of boxes of SFC related documents which the State has produced and Peterson's' counsel has inspected. The pollution from the SFC site is of a different type than the pollution contributed by poultry waste, and could not have contributed to the pollution of the upper Illinois River, its tributaries, or Lake Tenkiller without repealing the law of gravity and traveling upstream. Beyond a bald assertion that it wants the State's work product, Peterson gives no explanation whatsoever why this information is important to its defenses. Where such requested documentation is irrelevant, there can be no "substantial need" for it. Moreover, Peterson has also had the "substantial equivalent" of the withheld documents in the form of the State's extensive production of other materials pertinent to SFC, and the State has only withheld its work product, not the underlying facts about the history of the SFC plant. In fact, SFC is regulated by the United States Nuclear Regulatory Commission ("NRC") and the Oklahoma Department of Environmental Quality. The State produced huge volumes of publically available information regarding this site, including, but not limited to, information regarding the constituents of concern, operating permits, discharge permits and reclamation plans. Further, because SFC is regulated by the NRC, many facility documents are available on-line through the NRC website. Indeed, a draft Environmental Impact Statement, was recently published for public

comment. Moreover, to the extent Peterson needs actual data alleged to be in the State's work product, it could secure that data by appropriate depositions or by interrogatory. Despite the absence of any individualized, substantive showing for this information, as required by Fed. R. Civ. P. 26(b)(3), the Court erroneously ruled this information discoverable.

Peterson also makes conclusory statements of need for work product dealing with the city of Watts sewage lagoon or the gravel mining operations of Jock Worley in 1998 and 1999. Brief at 22. Peterson explains neither why it has a "substantial need" for such work product, nor why it should get such documents while itself resisting any discovery going back more than five years. The Court ruled that, at this time, production of data is not required beyond the five year temporal limit previously imposed by this Court. Order [DKT # 1629] at page 3. Even assuming there were no flat "five year rule" currently in place, Peterson has the burden of establishing not merely a want or a need, but must establish a "substantial need," to invade the State's work product on a document by document basis, and that there is no "substantial equivalent" of the information otherwise available to it. Given the breadth of the non-protected documents available to it, Peterson has the substantial equivalent of the requested information. Again, despite the absence of any individualized, substantive showing for this information, as required by Fed. R. Civ. P. 26(b)(3), the Court erroneously ruled this information discoverable.

By its terms, the Court's Order confuses the protected documents of the State with the "substantial equivalent" of the information contained in those documents. Even if Peterson did have a substantial need for the challenged work product -- which it has not established -- the information sought from those documents is available to Peterson through other discovery methods, such as interrogatories and depositions of knowledgeable witnesses who may be identified from the privilege logs. Thus, no invasion of the State's work product is justified.

Jinks-Unstead v. England, 232 F.R.D. 142, 147 (D.D.C. 2005). This burden is no greater than that normally found in litigation in which fact witnesses are located and deposed.

2. The Court has not protected the mental impressions, conclusions, opinions or legal theories of the State's attorneys or other representatives

Significantly, even Peterson Farms recognizes that the courts distinguish between "ordinary" work product, which consists of "raw factual information," and "opinion work product," which consists of thoughts and mental impressions of attorneys, Brief at 20, citing *Frontier Refining, Inc. v. Gorman-Rupp, Inc.*, 136 F.3d 695, 704 n. 12 (10th Cir. 1998), while making no attempt to justify invading the State's opinion work product. As the Court reviews the State's privilege logs, it will notice that they include a great many claims of work product protection in the form of memoranda or correspondence between the State's lawyers and client representatives. Indeed, many of the challenged documents bear a claim of attorney client privilege as well as work product protection. Obviously, such documents contain the mental impressions, opinions, conclusions, and legal theories of the State's counsel.

Curiously, in its Order denying reconsideration [DKT # 1629] at page 3, the Court states that "documents which have been produced *solely* under a claim of work product" must be produced to Peterson (emphasis in original).[4] This order appears to narrow the scope of the work product claims which have been swept aside, because the State claimed both attorney-client and work product protection for many of its documents, and thus such documents were not withheld *solely* on the basis of work product protection. However, the new and apparently narrower scope of the removal of work product protection gives the State no guidance about its treatment of

[4] This characterization does not actually reflect the contents of the original Order and does not explain how the Court made this finding only about those documents withheld *solely* because of work product protection.

documents for which production is ordered because the Court removed the State's claim of attorney-client privilege, but for which it continues to claim work product protection. Obviously, as a matter of simple logic, as long as the State's work product claim remains, documents should not be forcibly produced until Peterson meets its burden under Rule 26(b)(3).

By its terms, Rule 26(b)(3) requires, even when the required showing of substantial need and no substantial equivalent without undue hardship has been made, that the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. As this Court has recognized, opinion work product is afforded greater protection than fact work product, and, while the Supreme Court and the Tenth Circuit have not decided if such opinion work product is absolutely protected, at least some circuits have found it to be entitled to absolute protection. *See Cardtoons v. Major League Baseball,* 199 F.R.D. 667, 684-85 (N.D. Okla. 2001). Those courts permitting discovery of opinion work product have all indicated that mere inability to obtain information without undue hardship is insufficient to compel disclosure of opinion work product. *Id.* 199 F.R.D. at 685, relying upon *Frontier Refining, Inc. v. Gorman Rupp Co.*, 136 F.3d 695, 704 n. 12 (10th Cir. 1998).

Nevertheless, this is precisely what the Court did in its Order [DKT 1463] at page 4, and did again in its Order denying reconsideration [DKT # 1629] at page 3. The Court has made no provision to protect the opinion work product of the State or its representatives in circumstances under which the presence of opinion work product is obvious. Instead, the Court stopped its Order with the (incorrect) finding that Peterson had demonstrated both a special need and that the documents are not available from any other source. By stopping at that point, the Court's Order leaves the State's opinion work product entirely unprotected. This was clearly erroneous

and contrary to law. At a minimum, the Court should correct these Orders to provide the required protection for the mental impressions, conclusions, opinions, or legal theories of State's counsel or the State's other representatives.

V. Conclusion

WHEREFORE, in light of the foregoing, the State's Objections should be sustained, and the Order and Reconsideration Order should be vacated. .

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